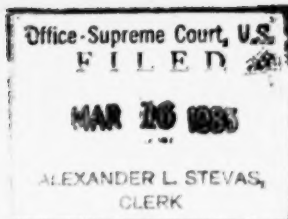


82-1612



No.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ABUL A. M. AHMED

Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Writ of Certiorari to the United

States Court of Appeals for the

District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Pro Se

Abul A. M. Ahmed
619 Edgewood Road
Apartment 122
Edgewood, Maryland
21040
(301) 676-2077

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the second decision of the Merit Systems Protection Board dated May 24, 1982, when Respondent's Petition for Review was filed too late and there was neither a Motion to Extend the Time for Filing by the Respondent nor an action by the Merit Systems Protection Board to extend the time to do so sua sponte.

2. Whether the Court of Appeals erred in affirming the second decision of the Merit Systems Protection Board that the Petitioner had not completed his probationary period.

TABLE OF CONTENTS

Rulings Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of Case	3

Argument	6
Conclusion	16
Appendices	
A. Decision of the Merit System Protection Board, dated July 15, 1981.	18
B. Opinion and Order of the Merit System Protection Board, dated May 24, 1982.	36
C. Judgment of the United States Court of Appeals for the District of Columbia Circuit, dated November 23, 1982.	45
D. Order of the United States Court of Appeals for the District of Columbia Circuit, dated December 16, 1982. .	48
E. Request For Personnel Action, dated March 2, 1979	50
F. Notification of Basic Pay Change, effective March 11, 1979.	51
G. Time Cards, pay period ending March 10, 1979.	52
H. Resignation, Dr. A. A. M. Ahmed, dated March 2, 1979	53
I. 5 U. S. C. Section 7703.	54
J. Letter dated june 24, 1982, from Carol E. Porter, Office of Personnel Management.	56

TABLE OF AUTHORITIES

Cases.

Albertson v. Federal Communications
Commission, 87 App. D.C. 39, 182 F.2d.
397 (1950).8

Henry v. Department of Labor, 293 A.
2d. 578 (Del, 1972)8

Statutes and Regulations

United States Code, Title 5, Section
7703. 34

5 Code of Federal Regulations, Section
1201.113.7, 8, 9, 10

5 Code of Federal Regulations, Section
1201.558

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

ABUL A. M. AHMED

Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, Abul A. M. Ahmed,
respectfully prays that a writ of cert-
iorari issue to review the Judgment dated
November 23, 1982, and the Order dated
December 16, 1982, of the United States
Court of Appeals for the District of Col-
umbia Circuit.

RULINGS BELOW

The Judgment of November 23, 1982,

and the Order of December 16, 1982, of the Court of Appeals, not yet reported to the knowledge of the Petitioner, appear in the Appendix hereto.

JURISDICTION

The Order denying the petition for rehearing timely filed by the Petitioner was entered on December 16, 1982, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

United States Code, Title 5, Section 4302(b).

See *infra*, page

United States Code, Title 5, Section 7703.

See Appendix, page 34.

5 C.F.R. 1201.113. See *infra*, page 9.

5 C.F.R. 1201.55. Motions.

(a) Form. All motions shall be in writing and shall state the reasons why the motion is requested. Motions shall

be submitted to the presiding official and he/she will provide the parties with copies. However, motions may be made orally during the course of a hearing.

(b) Objection. If a motions is made, in writing or orally, all other parties shall have an opportunity to object to it.

(c) Motions for Extension of time. Motions for extension of time will be granted only for good cause shown.

STATEMENT OF CASE

A comprehensive statement of the facts of this case are found in the original Decision (No. DC 315H8110448) dated July 15, 1981. To avoid unnecessary repetition of facts, Petitioner adopts the facts found therein. Said decision is found in the Appendix to this Petition.

This case began after Petitioner was appointed to the position of Environmental Scientist (Radiation), GS-1301 (41)-12,

effective March 5, 1978. During January, 1979, Petitioner as advised that his work performance was not satisfactory and he would be terminated before completing his probationary period. On March 2, 1979, following a meeting between Petitioner and agency officials, Petitioner submitted his resignation effective that date. The Petitioner completed the day's work on March 2, 1979, and was paid by the agency for that day's work. Petitioner's probationary period was over March 4, 1979. March 3 and March 4, 1979, were on a Saturday and Sunday, respectively, and Petitioner was not scheduled to work on either of those dates. Therefore, the last date on which Petitioner had a tour of duty was March 2, 1979, which he did complete and was paid for.

On March 7, 1979, Petitioner was appointed to another position in another

office of the agency. Petitioner was again advised that his performance was unsatisfactory before the termination of the year following his new appointment, which was also being termed a new probationary period by the agency. Petitioner was terminated March 5, 1980. Thereafter, Petitioner filed a complaint alleging his termination was a result of discrimination based on age, race, and national origin. The Merit System Protection Board, through its Presiding Official, found that the termination was illegal and ordered Petitioner reinstated based upon finding that he had completed the probationary period during the first appointment. The decision of July 15, 1981, became final on August 19, 1981. On August 20, 1981, Respondent filed a Petition for Review of the initial decision. Petitioner opposed the Petition for Review.

On May 24, 1982, the Merit Systems Protection Board reversed the initial finding, saying that the Board lacked any jurisdiction over the case since it had found the Petitioner was still a probationary appointee. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit.

The Court of Appeals, in a Per Curiam decision, affirmed, "for the reasons stated by the Merit Systems Protection Board in its Opinion and Order filed May 24, 1982," the second decision of the Board. Petitioner petitioned for a rehearing, which was denied by the Court of Appeals by Order filed December 16, 1982.

ARGUMENT

1. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE SECOND DECISION OF THE MERIT SYSTEMS PROTECTION BOARD DATED MAY 24, 1982, WHEN THE RESPONDENT'S PETITION FOR REVIEW WAS FILED TOO LATE AND THERE WAS NEITHER A MOTION TO EXTEND TIME FOR THE FILING BY THE RESPONDENT NOR AN ACTION BY THE MERIT SYSTEMS PROTECTION

BOARD TO EXTEND THE TIME TO DO SO SUA SPONTE.

The decision of the Merit Systems Protection Board (hereinafter, "Board") dated July 15, 1981, became final on August 19, 1981 (35 days after decision) under 5 C.F.R. 1201.113, in the absence of either party filing a Petition for Review with the Board and in the absence of the Board reopening or deciding to reconsider the case on its own motion by that date. Under 5 C.F.R. 1201.113 (a), any Petition for Review must be filed with the Office of the Secretary of the Board before the initial decision of the Board becomes final; i.e., not later than 35 calendar days after issuance of the initial decision. Having become final on August 19, 1981, the Board was divested of any jurisdiction to entertain a Petition for Review without a showing by the moving party of good cause justifying the delay.

The time period established by rule pursuant to statutory authority is jurisdictional, and, once it expires, the Board does not have authority to entertain a petition for review. Albertson v. Federal Communications Commission, 87 App. D.C. 39, 182 F. 2d. 397 (1950). The period during which the Board had jurisdiction to entertain a Petition for Review normally cannot be extended by the parties to the proceeding. Henry v. Department of Labor, 293 A. 2d. 578 (Del. 1972). In the instant case, a timely motion for extension of time to file pursuant to 5 C.F.R. 1201.55 would have met the requirements of 5 C.F. R. 1201.113 (d), but such a motion was not made.

It is uncontroverted that Respondent's Petition for Review was hand filed on August 20, 1981, one day late! The record is barren of anything to suggest that a petition for extension of time to file was

presented to the Board by the Respondent. Nor is there any record of the Board sua sponte reopening the case within the 35 days after the issuance of the initial decision. Therefore, pursuant to 5 C.F.R. 1201.113 and according to its own terms, the initial decision of the Board dated July 15, 1981, became final on August 19, 1981. 5 C.F.R. 1201.113 provides as follows:

The initial decision of the presiding official shall become final 35 days after issuance.

(a) Exceptions. The initial decision shall not become final if any party files a Petition for Review or if the Board reopens the case on its own motion within 35 days after issuance of the decision.

(b) Petition for Review denied. If the Board denies all Petitions for Review, the initial decision shall become final five days after the issuance of the last denial.

(c) Petition for Review granted or case reopened. If the Board grants a Petition for Review or reopens a case, the decision of the Board shall be the final decision.

(d) Extensions. The Board may extend the 35 day time limit for filing a petition for good cause shown.

(e) Exhaustion. Administrative remedies are considered exhausted when a decision becomes final in accordance within this section.

Accordingly, it is clear that the initial decision dated July 15, 1981, became the final decision of the Board on August 19, 1981, when the Respondent had not filed a Petition for Review nor requested and extension to file such a petition, and the Board was without any jurisdiction to render its second decision dated May 24, 1982. Since the Court of Appeals adopted the reasoning of the second (erroneous) Board decision, the Court of Appeals partakes of the same error and its decision should be reversed and the initial decision of the Merit Systems Protection Board dated July 15, 1981, should be reinstated.

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE SECOND DECISION OF THE MERIT SYSTEMS PROTECTION BOARD THAT THE PETITIONER HAD NOT COMPLETED HIS PROBATIONARY PERIOD.

The second decision of the Board held that the Petitioner failed to establish that his resignation became effective until after the completion of his probationary period. That decision is erroneous as a matter of law and the Board (and, therefore, the Court of Appeals) should be reversed.

The effective date of Petitioner's resignation was March 2, 1979 (see Appendix). The question is whether Petitioner completed his tour of duty prior to his resignation being effective. If he did complete the tour of duty, then his probationary period ended simultaneously with the completion of the tour of duty. Federal Personnel Manual (FPM) ch. 315, subch. 8-4 (f) (December 21, 1976).

The Board attempted to distinguish between a "separation" and a "resignation" in order to reach its conclusion that the regulations requiring separations to be-

come effective at midnight do not apply to resignations. In its haste to recite subchapter 2-2 of the FPM ch. 715, which provides that an employee is free to set the effective date of his resignation, the Board overlooked subchapter 2-1, which states: "Resignation is a separation in response to an employee's request for the action." See also letter of June 24, 1982, from Carol E. Porter, Office of Personnel Management in the Appendix. The Board has drawn a false distinction between the two words in view of the above. The timing of a resignation, i.e., the exact hour and minute, must be governed by subchapter 8-4(f) because a resignation is a separation as defined, and subchapter 8-4 (f) would set the time, unless otherwise stated in the action (here the resignation), as midnight of the effective date of the action.

Furthermore, the conclusion that the Petitioner did not complete his tour of duty and, therefore, his probationary period, is against all of the evidence in the record on that issue. Petitioner's certified time cards (see Appendix) for the pay period ending March 10, 1979, clearly shows that he worked the full eight hours on March 2, 1979, and that that record was certified as true by his supervisor. Petitioner was paid for the eight hours which he worked on March 2, 1979. Petitioner's resignation (see Appendix) was written 3-2-79 and declared "the effective date of my resignation will be 3-2-79." There is no authority for an agency to pay someone who is not an employee of the agency during the time for which a claim for pay is being asserted. Yet, Petitioner did work the eight hours on March 2, 1979, and he was certified by

his supervisor as an employee on the payroll of the agency and as having, in fact, worked the eight hours on March 2, 1979, and he was paid. To have paid a non-employee would violate section 3679 of the Revised Statutes (31 U.S.C. 665). The Board could not possibly consistently say that Respondent had the authority to pay Petitioner for services rendered after he resigned, thereby knowingly violating section 3679. However, the Board does imply that somehow on March 2, 1979 Petitioner could be paid while in a non-pay status, i.e., after separated by resignation. Petitioner met his burden of affirmatively showing that he had completed his probationary period on March 2, 1979, when he showed that he was on the payroll for the entire day on that date, that he, in fact, worked that entire day on that date, and that the fact of his work while on the payroll was certified by his supervisor and he was paid by the agency for his

work on that date. This showing is proof that he completed his probationary period because his probationary period expired that last day of his tour of duty preceding that anniversary of his appointment. The last day preceding the anniversary of his appointment was March 4, 1979, but as this fell on a Sunday and March 3, 1979, fell on a Saturday and the Petitioner was not scheduled for work on either of those dates, the last day of Petitioner's tour of duty preceeding the anniversary of his appointment was March 2, 1979, and Petitioner has established that he completed that date while still on the payroll and was paid for the work performed by him on that date.

Accordingly, this Court whould reverse that second decision of the Merit Systems Protection Board, and since the Court of Appeals partakes of the identical errors by reason of its adoption of the Board's

erroneous second decision, the decision of the Court of Appeals should be reversed and the initial decision of the Merit Systems Protection Board should be reinstated.

CONCLUSION

For the reasons shown above, the Petitioner submits that he had demonstrated that there is serious error in the second decision of the Merit Systems Protection Board adopted by the Court of Appeals, or that he has demonstrated that the decision relied upon by the Court of Appeals is open to serious question. Accordingly, it is respectfully submitted that this Honorable Court should issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision based upon the decision of the Merit Systems Protection Board dated May 24, 1982.

-17-

Respectfully submitted,

Abul A. M. Ahmed

ABUL A. M. AHMED
619 Edgewood Road
Apartment 122
Edgewood, Maryland 21040
(301) 676-2077

Pro Se

I HEREBY CERTIFY that on the 14th
day of March, 1983, three (3) copies of
the foregoing Petition for Writ of Cert-
iorari were mailed by first class mail,
postage prepaid to the Office of the
United States Attorney, United States
Courthous, Washington, D.C. 20001, Atten-
tion: Michael J. Ryan, Esquire, Counsel
of record for the Respondent.

Abul A. M. Ahmed
ABUL A. M. AHMED

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

IN THE MATTER OF)

ABUL A. M. AHMED,) DECISION NO.

Ph.D.) DC315H811Ø448

v.)

ENVIRONMENTAL) DATE July 15, 1981

PROTECTION)

AGENCY)

INTRODUCTION

On March 13, 1981, Dr. Abul A.M. Ahmed filed an appeal from the agency's action terminating him from his position, effective March 5, 1980, during what it alleged was a probationary period.

BACKGROUND

The record reflects that appellant

was appointed to the position of Environmental Scientist (Radiation), GS-1301(41)-12, effective March 5, 1978. Sometime during January 1980, appellant was advised by his supervisor that the agency was not satisfied with the quality of his work performance. Appellant was further advised that he was to be terminated prior to the completion of his probationary period. A meeting was held between appellant and agency officials on March 2, 1979, the exact nature of which is somewhat in dispute. However it is clear that appellant submitted his resignation, effective that date, for "personal reasons".

Five days later, on March 7, 1979, appellant was appointed to the position of Environmental Scientist, GS-1301(31)-12, in another office of the agency. He was advised that this appointment, like the previous one, was

subject to his satisfactory completion of a one-year probationary period. By memorandum dated January 18, 1980, appellant was advised that, due to his supervisor's reservations as to appellant's ability effectively to perform his duties, he was again to be terminated during his probationary period. Appellant was so terminated, effective March 5, 1980. On March 26, 1980, appellant filed a formal complaint, alleging that his termination was the result of discrimination based on age, race, and national origin.

TIMELINESS

The agency argues that appellant's appeal, as it relates both to the circumstances surrounding his resignation in 1979, and to the propriety of his termination in 1980, should now be dismissed since the 20-day time limit for

filing an appeal of either action has long since passed. 5 C.F.R. 1201.22(b).

With regard to the later action, I note that appellant filed a complaint of discrimination concerning his termination and that there has been no final decision on the matter. Merit Systems Protection Board regulations dealing with the requirements for filing a petition raising issues of prohibited discrimination are found at 5 C.F.R. 1201.154. In pertinent part, they state as follows:

(a) Where the appellant has filed a timely formal complaint of discrimination with the agency:

(1) A petition must be filed within 20 days after receipt of the agency resolution or final decision on the discrimination issue; or

(2) When the agency has not resolved the matter or issued a

final decision on the formal complaint within a 120-day period, the appellant shall nonetheless file an appeal to the Board within a year after the filing of the formal complaint with the agency.

The record before me reflects that appellant's March 26, 1980, complaint of discrimination was timely filed with the agency, that the matter has not as yet been resolved, and that more than 120 days has elapsed since the complaint was filed. Additionally, appellant filed his appeal with the Board on March 13, 1981, - within one year of the date he filed his complaint. I therefore find that appellant's appeal of his March 5, 1980, termination would be timely, if it were found to be an action over which the Board has appellate jurisdiction, a matter to be discussed below.

JURISDICTION

An individual serving a probationary period has no statutory right of appeal to the Board from a termination during that period. 5 U.S.C. 7511(a)(1)(A). However, a limited right of appeal has been granted to probationary employees under Office of Personnel Management (OPM) regulations. Specifically, a probationary employee terminated for conditions arising before his appointment may appeal on the ground that his termination was not effected in accordance with the procedural requirements set forth in the regulations. 5 C.F.R. 315.806(c). Furthermore, a probationary employee may appeal his termination if he alleges that it was based on partisan political reasons or marital status. 5 C.F.R. 315.806(b).

Since appellant was not terminated

for pre-appointment reasons, and since he has not alleged discrimination based on partisan politics or marital status, it would appear that the matters he has raised are not appealable to the Board. However, it is appellant's contention that he was not, in fact, a probationary employee in March 1980, and that, therefore, his being terminated as such denied him the fundamental due process rights accorded non-probationary employees either under 5 U.S.C. 4303 or 5 U.S.C. 7513, which rights, at a minimum, include an opportunity to contest the agency's action.

Appellant's argument in this matter relates back to, and is crucially dependent upon, his status on March 2, 1979, the date he resigned from his first position. He states, by way of background, that he was appointed to the position of Environmental Scientist,

GS-12, on March 5, 1979, with the one year required probationary period beginning on that date. His anniversary date was to be March 5, 1979, and his probationary period was to end at the end of his tour of duty on the day before the anniversary date, March 4. However, he argues, since March 4 was a Sunday and March 3 a Saturday, and since these days were not part of appellant's regular tour of duty, his probationary period ended on Friday, March 2, at 4:30 P.M., the end of his work day. His resignation, however procured, was likewise on March 2. But since separations are, unless contradicted, effective at midnight, appellant alleges, he had at that time, already completed his probationary period. Therefore, he continues, upon his reinstatement on March 7, 1979, he should not have been required to serve a new probationary period since he had

already acquired competitive status. Hence, in March 1980, when the agency decided to terminate him, it was estopped from so doing without affording him either the procedural entitlements set forth in 5 U.S.C. 7513 and 5 C.F.R. 752.404, or those set forth in 5 U.S.C. 4303 and 5 C.F.R. 432.204. These include 30 days advance written notice, stating the specific reasons for the proposed action, a reasonable time to answer and to furnish evidence in support thereof, a right to be represented by an attorney or other representative, and a written decision and the specific reasons therefor at the earliest practicable date. Additionally, an employee subject to the above quoted sections is entitled to have the merits of the action reviewed on appeal to this Board.

The agency argues that appellant was serving a probationary period, both at

the time of his resignation and at the time of his termination in March 1980. It contends that appellant did not complete his first probationary period until the end of the last day before the anniversary date (Sunday), not the last work day (Friday). Since appellant resigned on Friday, he resigned before completing his probationary period. Therefore, upon reinstatement, he was required to serve a new probationary period. And since he has not alleged discrimination on the basis of partisan politics or marital status, he has not raised a matter appealable to the Board.

Federal Personnel Manual (FPM) ch. 315, subch. 8-4(f), upon which both parties to this matter heavily rely, provides in pertinent part for the following procedures in the separation of probationers:

. . . the employee's separation

from the rolls must be effected before the employee has completed his/her probationary or trial period. Otherwise, the procedures applicable to the separation of a career-conditional employee who has completed his/her probationary period are mandatory. To separate an employee before the completion of the probationary period, an agency must separate him/her before the end of his/her tour of duty on the last day of probation, which is the day before the anniversary date. Because separations are effective at midnight and probationary periods are completed at the end of a tour of duty, it is advisable for an agency that wishes to separate

a probationer to separate him/her no later than the day before probation will have been completed.

Appellant had no tour of duty on the day before his anniversary date because it (the day before his anniversary date) fell on a Sunday. He likewise has no tour of duty on Saturday, March 3, the day preceding. Therefore the last day of his probationary period was the last day on which he had a tour of duty, Friday, March 2. Since, according to the previously-quoted FPM section, his resignation (which is, after all a separation) was effective at midnight on March 2, and since he completed his probationary period at the end of his tour of duty (4:30 P.M.) on March 2, I find that appellant had, in fact, completed his probationary period.

Jeffery v. Department of the Treasury,

MSPB Docket No. SF315H90992 (October 3, 1980). The record reflects that appellant's second appointment was effected pursuant to 5 C.F.R. 315.401, the section dealing with career or career-conditional employment by reinstatement. FPM ch. 315, subch. 8-2(b)(1), in describing when an employee so reinstated is considered to have completed his probationary period, states as follows:

Upon reinstatement to serve as a career or career-conditional employee, an employee is required to serve a new probationary period of one year beginning on the date of reinstatement unless, during any period of service which affords a current basis for reinstatement, he either completed a probationary period

or served with competitive status under an appointment which did not require him to serve a probationary period.

Having found that appellant had previously completed a probationary period, I further find, according to the above-quoted section of the FPM, that he was not required, upon reinstatement on March 7, 1979, to serve a new probationary period. As a career-conditional employee, then, he was entitled either to the procedural requirements set forth in 5 U.S.C. 7513 and 5 C.F.R. 752.404 or to those set forth in 5 U.S.C. 4303 and 5 C.F.R. 432.404, once the agency decided to remove him. The agency erred, I find, in not treating appellant's removal as an adverse or performance related action, and in not affording him the procedural rights attendant thereto.

However, in order for the agency's action to be reversed, the procedural error must be harmful. The burden of proving harmful procedural error is placed on the appellant. See 5 U.S.C. 7701(c)(2)(A); 1 MSPB 489 (1980). Under 5 C.F.R. 1201.56(c)(3), the appellant is required to show that "based on the record as a whole the error . . . caused substantial harm or prejudice to his . . . rights." In connection therewith, the Board has previously held that an agency's failure to state the specific reasons for the termination, coupled with its failure to afford the employee a right to respond to those reasons, constitute error substantially prejudicial to the employee's rights, specifically his rights under either subpart D of part 752, or subpart B of part 432 of the Office of Personnel Management (OPM) regulations. Hibbard v.

Department of the Interior, MSPB Docket
No. AT315H09043 (May 14, 1981).

Accordingly, I find that appellant has satisfied his burden of showing harmful procedural error, such that the agency action must be reversed.

In view of the above, I find it unnecessary to reach the issue of appellant's allegations of discrimination in connection with this matter.

DECISION

Appellant's termination effective March 5, 1980, is hereby REVERSED. The agency is ordered to provide this office with a copy of the personnel action form or other appropriate documentation, reflecting compliance with this decision not later than thirty (30) days after this decision becomes final.

This decision is an initial decision and will become a final decision of the

Merit Systems Protection Board on August 19, 1981 unless a petition for review is filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal or the Director of the Office Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulation.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington D.C. 20419 no later than thirty-five (35) calendar days after issuance of this decision.

The Board may grant a petition for review when a party submits written

argument and supporting documentation which tends to show that:

- (1) New and material evidence is available that despite due diligence was not available when the record was closed; or
- (2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate Circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

Linda F. Schweizer
Presiding Official

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ABUL A. M. AHMED)	
v.)	
ENVIRONMENTAL)	DOCKET NUMBER
PROTECTION)	DC315H8110448
AGENCY)	
)	

OPINION AND ORDER

Appellant was separated from his position with the agency allegedly during his probationary period. He appealed to the Washington, D.C. Regional Office of the Board contending that he had completed a probationary period in a previous appointment and was therefore a nonprobationary employee when he was appointed to the position from which he was separated. The presiding official found that appellant was a non-

probationary employee at the time of his separation and that the agency therefore committed harmful procedural error in failing to afford him those statutory and regulatory procedural rights to which he was entitled.

The agency petitions for review of the initial decision alleging error by the presiding official in his findings. In opposition to the petition, appellant contends that none of the regulatory criteria for review has been met.*/ The petition for review is GRANTED.

*/ Appellant also alleges in his response to the petition for review that the agency petition was untimely filed based on the date signed and on the date received by the Office of the Secretary. However, the Board's practice is to accept the postmark date as the date of filing. See Beer v. Department of the

Army, 2 MSPB 226,227 n. 2 (1980). Using this standard, the agency petition was timely filed. Further, the last day for timely filing was August 19, 1981, and not August 18, 1981, as appellant has contended. (See Initial Decision at 6).

Appellant was appointed effective March 5, 1978, to the position of Environmental Scientist in the agency's Office of Radiation Programs and resigned on March 2, 1979, to avoid termination for unsatisfactory performance. On March 7, 1979, he was appointed to the position of Environmental Scientist in the agency's Office of Testing and Evaluation and was terminated effective March 5, 1980, for unsatisfactory performance. He contended that he had completed his probationary period in his first position in that his resignation was not effective until after he completed his tour of duty on the last day before his anniversary

date.

Under the Federal Personnel Manual (FPM) ch. 315, subch. 8-4(f) (December 21, 1976), an employee completes his probationary period at the end of his tour of duty on the last day before the anniversary date. In this case, appellant's anniversary date, March 5, 1979, fell on a Monday. Therefore the last day of his tour of duty before his anniversary date was Friday, March 2, 1979, since he had no tours of duty on the weekend. Thus, his probationary period would have been completed at the end of his tour of duty, 4:30 p.m., on March 2, 1979.

Under subch. 8-4(f), a separation, in order to be effective before the end of the probational period, must be made effective prior to the end of the employee's tour of duty since separations are otherwise effective at midnight. See

Jeffery v. Department of the Treasury, 3 MSPB 479, 481 (1980). We note though, that subch. 8-4(f) refers solely to separations during the probationary period and makes no reference to resignations. FPM ch. 715, subch. 2-2 (August 23, 1973), which covers the effective date of resignations, merely provides that an employee is free to set the effective date of his resignation and, unlike subch. 8-4(f), does not provide a specific time for a resignation to become effective. We therefore find that there is no FPM requirement that a resignation become effective at midnight and that appellant has not established that his resignation did not become effective until after the completion of his probationary period.

Appellant further alleged that his resignation was involuntary and, thus, was tantamount to a separation effective

subsequent to the completion of his probationary period. In Myslik v. Veterans Administration, 2 MSPB 241 (1980), the Board, quoting from Leone v. United States, 204 Ct. Cl. 334, at 339 (1974), set forth the following criteria for determining the voluntariness of a resignation: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party."

Appellant has not submitted evidence establishing that the foregoing criteria have been satisfied. Appellant has merely alleged that his resignation was involuntary because he had to resign rather than be terminated and that his supervisor threatened that "he would put something very bad in (appellant's) file" if appellant did not resign. The Board

has held that a choice between resignation and removal is not in itself evidence of duress. See Myslik, supra, at 242. Further, appellant's supervisor denied that he had threatened appellant as alleged, and appellant has submitted no evidence in support of his allegation. Additionally, the record shows that after appellant was granted the option to resign rather than be terminated, he deliberately delayed resigning until the last day of his probationary period. Thus, there was no time pressure involved. We therefore find that appellant has failed to prove that his resignation was involuntary. Thus, we further find that appellant's resignation was not tantamount to a separation.

Under the Board's regulations, the appellant carries the burden of proving jurisdiction. See 5 C.F.R. § 1201.56(a)(2). In the instant case, in

order to establish the Board's jurisdiction, appellant was required to prove that his resignation became effective subsequent to the completion of his probationary period. However, appellant has shown only that he resigned on March 2, 1979. Therefore, we find that appellant has failed to show that he had completed his probationary period or was otherwise entitled to appeal to the Board. See Shane v. Department of the Navy, 2 MSPB 128 (1980). Consequently, the Board lacked jurisdiction over this appeal, and the presiding official erred in finding to the contrary. Because, we find that the Board lacked jurisdiction, we need not consider the issues of discrimination based on age, race, and national origin.

Accordingly, the petition for review is GRANTED, the initial decision is VACATED, and the appeal is DISMISSED.

-44-

This is the final order of the Merit Systems Protection Board in this appeal.
5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

May 24, 1982

Date

Washington, D.C.

Robert E. Taylor

Secretary

-45-

Not To Be Published-See Local Rule 8 (f)

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

(No Opinion)

Nos. 81-2362 &	September Term 1982
82-1689	United States Court
	of Appeals
	For the District of
	Columbia Circuit

ABUL A. M. AHMED

v.

ENVIRONMENTAL	Filed Nov. 23, 1982
PROTECTION	
AGENCY,	George A. Fisher,
Respondent	Clerk

Petitions for Review of Orders of
the Merit System Protection Board.

Before WRIGHT, TAMM, and WALD,
Circuit Judges.

-46-
JUDGEMENT

These causes came on to be heard on petitions for review of orders of the Merit Systems Protection Board and were briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. See D.C. Cir. Rule 13(c).

Generally for the reasons stated by the Merit Systems Protection Board in its Opinion and Order filed May 24, 1982, it is

ORDERED AND ADJUDGED by this court that the orders of the Merit Systems Protection Board sought to be reviewed herein are hereby affirmed.

It is FURTHER ORDERED by this court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C.

-47-

Cir. Rule 14, as amended November 30,
1981 and June 15, 1982.

Per Curiam

For the Court

George A. Fisher

Clerk

-48-

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 81-2362 September Term, 1982

ABUL A. M. AHMED,

Petitioner Argued 11-12-82

v.

ENVIRONMENTAL Filed Dec. 16, 1982

PROTECTION

AGENCY, George A. Fisher,

Respondent Clerk

And consolidated case

No. 82-1689

BEFORE: Wright, Tamm and Wald, Circuit
Judges

O R D E R

On consideration of petitioner's
petition for rehearing, filed December
13, 1982, it is

-49-

ORDERED by the Court that the
aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY:

Robert A. Bonner,
Chief Deputy Clerk

-50-

Standard Form 89 - Rev. July 1968
U.S. Civil Service Commission
774-6-753

REQUEST FOR PERSONNEL ACTION

PART I. REQUESTING OFFICE: Less otherwise instructed, fill in all items in Part I except those inside the heavy lines. If applicable, submit resignation and separation data on reverse side.

1 NAME (Last, first, middle) AMMED, ABUL, A.M.	2 (For agency use) MR.	3 BIRTH DATE (Mo., Day, Year) 07-12-24	4 SOCIAL SECURITY NO. 312-46-7841
5 KIND OF ACTION REQUESTED (1) PERSONNEL (Specify appointment, reassignment, resignation, etc.) Resignation		6 REQUEST NUMBER	7 DATE OF REQUEST 3/2/79
8 POSITION (Specify established, reserve, abolished, etc.)		9 PROPOSED EFFECTIVE DATE 3/3/79	10 POSITION SENSITIVITY

11 VETERAN PREFERENCE 1-NO 2-5 PT 3-10 PT 4-15 PT 5-20 PT 6-25 PT 7-30 PT 8-35 PT 9-40 PT 10-45 PT 11-50 PT 12-55 PT 13-60 PT 14-65 PT 15-70 PT 16-75 PT 17-80 PT 18-85 PT 19-90 PT 20-95 PT 21-100 PT	12 TENURE GROUP	13 SERVICE COMP. DATE	14 HANDICAP CODE
15 RETIREMENT 1-YES 2-NO 3-OTHER	16 EFFECTIVE DATE (Mo., Day, Year) 03-02-79	17 CIVIL SERVICE OR OTHER LEGAL AUTHORITY	18 (For CSC use)

19 FROM: POSITION TITLE AND NUMBER W-7-164	20 PAY PLAN AND OCCUPATION CODE GS 1301	21 (a) GRADE (b) STEP OR LEVEL 12 01	22 SALARY
23 NAME AND LOCATION OF EMPLOYING OFFICE EPA, ASST ADHR FOR AIR, NOISE & RADIATION, DPTY ASST ADHR FOR RADIATION PROGRAMS, CRITERIA & STANDARDS DIVISION, FEDERAL GUIDANCE BRANCH, WASHINGTON, D.C.			

24 TO: POSITION TITLE AND NUMBER	25 PAY PLAN AND OCCUPATION CODE	26 (a) GRADE (b) STEP OR LEVEL	27 SALARY
28 NAME AND LOCATION OF EMPLOYING OFFICE			

29 DUTY STATION (City-county-State) Arlington, VA	30 LOCATION CODE
31 APPROPRIATION 689/00108 966033C095 DA 8029	32 POSITION OCCUPIED 1-CONSTITUTIVE SERVICE 2-ACCEPTED SERVICE
33 APPROPRIATED POSITION FROM TO STATE	34 (1) PROPOSED (2) DATED

3 REMARKS BY REQUESTING OFFICE (Continue on item 9 on reverse side, if necessary)

4 REQUESTED BY (Signature and title) (Leave blank if resignation) A.C.B. Richardson, Chief, FGB	5 REQUEST APPROVED BY SIGNATURE WILE Director, CSD
6 FOR ADDITIONAL INFORMATION - Call (Phone and telephone number) Linda Perkins x7076	

PART II. TO BE COMPLETED BY PERSONNEL OFFICE (Items inside heavy lines in Part I above also to be completed)

7 POSITION CLASSIFICATION AS PER MINIMUM ADDITIONAL	8 NEW	9 YES	10 REASON
11 CLEARANCE	12 Signature	13 Date	14 REMARKS (Note: Use item 10 on reverse for Standard Form 10 remarks)
15 (a) GEN. ON POS. CONTING.	Mem. 3/5/79		
16 CLASSIFICATION			
17 PLACE REQUEST FOR EMP.			
18 APPROVED BY			

-51-

EXHIBIT 5a

U. S. DEPARTMENT OF THE INTERIOR NOTIFICATION OF BASIC PAY CHANGE							USGS FORM 5-1236 NOV. 68 APPROVED EXCEPTION NO. 1178
BUREAU CODE	EMPLOYEE NAME	DOC. SEC. NO.	ORGAN. CODE	HDQTRS CODE	BUDGET OFF		
IP	AMHFO, ABUL A. M.	312467843	74011000	112010001	7216		
NATURE OF ACTION CODE		893-QUALITY INC.	898-ADMIN. PAY INC.	EFFECTIVE DATE	LAST EQUIVALENT INCREASE DATE	OLD SALARY	
R03		*893-WITHIN-GR INC.	003 CORRECTION OF:	02/11/79	03/05/78	23,087	
		894-PAY ADJUSTMENT					
PAY PLAN	GRADE OR LEVEL	OCCUPATION CODE	NEW STEP OR RATE	NEW SALARY	EXCESS MON. PAY STATUS MON. REMARKS FOR EXPLANATION		
G5	12	01301	02	23,857	0		
REMARKS: * FOR GS AND FC SCHEDULES, WORK IS OF AN ACCEPTABLE LEVEL OF COMPETENCE. FOR W AND SF SCHEDULES, PERFORMANCE IS SATISFACTORY OR BETTER.							
THE WAITING PERIOD FOR YOUR NEXT STEP INCREASE IS 92 WEEKS FROM THE ABOVE EFFECTIVE DATE. THIS PERIOD CAN BE CHANGED BY AN EQUIVALENT INCREASE ACTION, EXTENDED LWOP, OR NON-WORK DAYS IF INTERMITTENT.							
SIGNATURE					DATE		
1. PERSONNEL FOLDER COPY							

4. PERSONNEL FOLDER COPY

11/29/11

Copy made 6/5/81
by Ruby Shelton
Payroll EPA

EXHIBIT 10

[illegible]

28/24 H.7

-53-

PART III. TO BE COMPLETED BY EMPLOYEE

RESIGNATION (IMPORTANT NOTE TO EMPLOYEE: Give specific reasons for your resignation. Avoid generalized reasons, such as: "at fault," "personal reasons,"

I RESIGN FOR THE FOLLOWING REASONS

3-2-79
(Date of resignation or written)

Personal Reasons

THE EFFECTIVE DATE OF MY RESIGNATION WILL BE

3-2-79

A. A. A. M. Albert
(Signature)

PART IV. SEPARATION DATA

FORWARD COMMUNICATIONS, INCLUDING SALARY CHECKS AND BONDS TO THE FOLLOWING ADDRESS

(Number and Street)

(City)

(State)

(ZIP Code)

PART I. (Continued)

REMARKS BY REQUESTING OFFICE

PART II. (Continued)

STANDARD FORM 28 REMARKS

- ☐ SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY (OR TRIAL) PERIOD COMMENCING _____
- ☐ SERVICE COUNTING TOWARD CAREER (OR PERMANENT) TENURE FROM _____
- ☐ SUCCESSOR POSITION--EMPLOYEE RETAINED IN THE COMPETITIVE SERVICE
- ☐ ENTRANCE PERFORMANCE RATING SATISFACTORY
- SEPARATIONS: SHOW REASONS GIVEN AS REQUESTED CHECK, IF APPLICABLE: ☐ DURING PROBATION

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1140; amended Pub. L. 96-54, Aug. 14, 1979, 93 Stat. 384.)

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or

regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1143.)

-56-

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT

Washington, D.C. 20415

June 24, 1982

Dr. A. A. Ahmed

River House No. 1, Apt. B-306

1111 Army-Navy Drive

Arlington, VA 22202

Dear Dr. Ahmed:

The following information is furnished in response to our conversation of June 23, 1982.

OPM's policy on setting effective dates is set forth in Chapter 296 of the Federal Personnel Manual (FPM). Subchapter 3, S3-4, states that:

"Unless otherwise indicated on the Notification of Personnel Action, a separation and an action to terminate grade or pay retention is effective at the beginning of the day (12:01 a.m.)."

The term "separation" is a generic term. Separations include all actions which result in the employee being dropped from the rolls of the agency. This means that separations include all types of resignations, all types of retirements, all types of termination actions and all types of removal actions.

In the case you described to me where an employee resigned and did not specify a time of day on his resignation, that action is effective at midnight of the

- 58 -

effective date he gave for his
resignation.

Sincerely yours

Carol E. Porter

Personnel Management Specialist

Workforce Records Management Division

Compliance and Investigations Group

END OF DOCKET